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May 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: October 6, 2004

Case No.: TIA-0236

XXXXXXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant's late husband (the Worker) was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept

a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a carpenter at DOE's Savannah River site (the site) for approximately three years, from 1951 to 1954. The Applicant filed an application with OWA, requesting physician panel review of one illness - chronic obstructive pulmonary disease (COPD).

The Physician Panel rendered a negative determination on the claimed COPD. The Panel determined that the Worker's occupational exposures were too low to have caused his illness. The Panel stated that "[the Worker] was a smoker until he quit in 1964, smoking one to four packs per day, but oftentimes not smoking the entire cigarette." Panel Report at 1.

The OWA accepted the Physician Panel's negative determination and the Applicant filed the instant appeal. In her appeal, the Applicant contends that the Panel's statement regarding the Worker's smoking is incorrect.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's argument does not present a basis for granting the appeal. Based on our review of the record, it appears that the Applicant is correct that the Panel misstated the extent of the Worker's smoking. The only reference to the Worker's smoking is a statement noted in the case history. According to that statement, the Worker "stopped smoking in 1964, but [the Applicant] did not know when he started. He also smoked about 1/4 pack per day and did not smoke the entire cigarette." Record at 20. This statement seems to indicate that the Worker smoked *one-quarter* of a pack per day rather than *one to four* packs per day. However, even if the Panel overstated the extent of the Worker's smoking, the error does not present a basis for granting the appeal. The Panel report included a discussion of the Worker's exposures. The key determination here was that the Panel considered the Worker's exposures to be too low to have been related to the Worker's COPD. Accordingly, the appeal should be denied.

In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0236 be, and hereby is, denied.
- (2) This denial pertains only to the DOE appeal and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 11, 2005